Nos. 78-575, 78-597 and 78-604

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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SOUTHERN RAILWAY COMPANY, PETITIONER

*v.*

SEABOARD ALLIED MILLING CORP., ET AL.

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INTERSTATE COMMERCE COMMISSION, PETITIONER

*v.*

SEABOARD ALLIED MILLING CORP., ET AL.

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SEABOARD COAST LINE RAILROAD COMPANY, ET AL., PETITIONERS

*v.*

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 570 F. 2d 1349. The opinion of the Interstate Commerce Commission (Pet. App. 1b-5b) is not reported.

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[1] "Pet. App." refers to the appendix to petition No. 78-575.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on February 16, 1978. A petition for rehearing was denied on May 12, 1978 (Pet. App. 1d). The petitions for a writ of certiorari were filed on October 6, 1978 (No. 78-575) and October 10, 1978 (Nos. 78-597 and 78-604), within the time as extended. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

## QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission refusing to investigate a proposed rate increase.

## STATEMENT

1. Under the Interstate Commerce Act, carriers have the initiative in railroad ratemaking, subject to advance notice requirements and to the Commission's powers to suspend and investigate proposed rates changes. See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973). Whenever a tariff schedule is filed with the Commission stating a new rate, the Commission may order a hearing concerning the lawfulness of the rate. See 49 U.S.C. (1976 ed.) 15(8)(a).[2] Congress also has given the Commission a discretionary power to suspend a proposed rate schedule for seven months beyond its proposed effective date.[3]

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[2]On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. For purposes of clarity, we refer to the statutes by their former designations.

[3]The suspension period may be extended to ten months if the Commission makes a written report to Congress that it is unable to render a decision within the seven-month period. 49 U.S.C. (1976 ed.) 15(8)(a).

The circumstances under which the Commission may exercise its power to suspend railroad rate increases were significantly limited by



2. The principal southern railroads filed a tariff schedule in August 1977 that contained a 20% seasonal surcharge on the shipment of specified grains between the states of Illinois and Indiana and points in, generally, the southeastern United States.[4] Some 35 parties, including shippers, associations, state departments of agriculture, and the United States Department of Agriculture asked the Commission to suspend and investigate the rate. Protestants alleged that the proposed tariffs were unreasonable and discriminatory, in violation of Sections 1(5), 2, 3(1) and 4(1) of the Act, 49 U.S.C. 1(5), 2, 3(1) and 4(1), and that, because the last-minute timing of the surcharge would not permit shippers sufficient time to alter their transportation plans, the tariffs should merely give a windfall to prosperous railroads without any demonstrable public benefit (Pet. App. 2a-5a).

The Commission denied the petitions for suspension and investigation of the rates (Pet. App. 1b-5b). The Commission held that the evidence did not warrant suspension of the tariff, but it "admonished" the railroads to "take prompt action to remove violations of the long-and-short haul provision of Section 4(1) of the Act, if

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amendments contained in the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). See 49 U.S.C. (1976 ed.) 15(8)(b), (c), and (d). The Commission's power to order an investigation into proposed rates was not affected by the 4-R Act, although Congress placed strict requirements on the time within which the Commission must render a final decision. See 49 U.S.C. (1976 ed.) 15(8)(a).

[4]Section 202(d) of the 4-R Act, codified at 49 U.S.C. (1976 ed.) 15(17), authorizes the Commission to set standards and procedures for the establishment of railroad rates based on "seasonal, regional, or peak-period demand for rail services." The Commission's regulations are codified at 49 C.F.R. 1109.10. The three-month surcharge in this case expired on December 15, 1977.

any" (Pet. App. 2b).[5] The Commission declined to exercise its authority to suspend the rates, holding that the proposal "appears to be in general conformity" with the goals of the 4-R Act and that the protestants had not "sustained their burden on the section 1(5) assertions" (Pet. App. 3b). The ICC stated that the allegations of violations of Section 2 and Section 3(1) appeared to stem from "the possibly overbroad scope of the proposal" but held that there was insufficient evidence to warrant suspension (Pet. App. 3b). The Commission referred to a "clear Congressional purpose to permit experimental ratemaking" and observed that "[t]he complaint sections of the Act protect, to a certain extent, the interests of those who may be adversely affected" (Pet. App. 4b).

3. The court of appeals vacated the Commission's order and remanded the case for further proceedings. The court concluded that, under the "peculiar circumstances of this case," where charges of Section 4(1) violations have "sufficient substance," the Commission erred by failing to open a formal investigation (Pet. App. 12a-14a). It rejected the Commission's argument that this Court's holding in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), precludes judicial review (Pet. App. 10a-12a). Instead, the Court concluded, the overall statutory scheme demonstrates that Congress did not intend to preclude judicial review of such decisions "under all circumstances" (Pet. App. 11a).

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[5]Section 4(1), which is as old as the Commission itself, 24 Stat. 380 (1887), essentially prohibits a railroad from collecting a greater total charge for shipments over shorter distances than over longer distances when both involve the same route and direction. The prohibition is absolute, with relief available only by express Commission findings, after investigation, that a "special case" exists. See *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914).



## DISCUSSION

1. We agree with petitioners that the circuits are in conflict on the question whether decisions by the Commission not to open investigations into proposed rate changes may be reviewed immediately by the court of appeals. The decision in the present case conflicts with *Asphalt Roofing Manufacturers Association* v. *ICC*, 567 F. 2d 994 (D.C. Cir. 1977), which concluded that the power to suspend and the power to investigate are committed, to the same extent, to the Commission's discretion. Because courts may not review decisions not to suspend rates, the *Asphalt Roofing* court held, they may not review decisions not to open investigations. 567 F. 2d at 1000-1003. Here, by contrast, the court of appeals concluded that suspension and investigation are fundamentally different, and that judicial review of decisions not to investigate would not raise the prospect of judicial disruption of the transportation business that led the Court to conclude, in *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), that the Commission's decisions concerning suspension are not judicially reviewable. See Pet. App. 6a-12a.[6]

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[6]The *Asphalt Roofing* case is technically distinguishable from the present decision on the ground that it involved a general revenue increase and implicated questions of the Commission's judgment, whereas the present case involves a more narrow rate proposal and rates that arguably are unlawful on their face. This distinction will not stand up, however, because the threshold question in both cases is the court of appeals' jurisdiction to examine the Commission's decision. The argument that the Commission abused its discretion in not opening an investigation is stronger where, as here, the probable unlawfulness of the rates is apparent without detailed study, but the extent of jurisdiction should not turn on the strength of the position of the aggrieved parties. See *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

In light of the conflict among the circuits, we believe that the Court should grant the petitions. The question of reviewability is of potential importance in every case in which a carrier proposes a change in rates. Because the rules concerning the extent of jurisdiction should be clear,[7] the Court should resolve the conflict in this case.

2. Although we believe that the Court should give plenary review to this case, we do not agree with the positions of either petitioners or the court of appeals. Petitioners are wrong to the extent that they urge that the decision not to open an investigation is absolutely unreviewable. The court of appeals is wrong to the extent that it held that the case is ripe for review as soon as the Commission declines to open an investigation.

*a.* Unless some statute explicitly forbids judicial review of particular agency action, there is a strong presumption in favor of review created by 5 U.S.C. 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Review is unavailable only if some other statute "expressly or impliedly forbids the relief which is sought." The Court has held that judicial review is available—in the absence of a review preclusion statute—unless the statutory scheme affords persuasive reason to believe that Congress desired to preclude review. See *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977) (collecting cases).

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[7]See, *e.g.*, *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 386-387 (1978).



No statute explicitly forbids judicial review of a decision by the Commission not to open an investigation. Moreover, there is no reason to think that the statutory scheme of the Interstate Commerce Act necessarily precludes review. Although an investigation will require expenditures of the agency's time and resources, Congress has required the Commission to make such expenditures on demand. Section 13(1), 49 U.S.C. (1976 ed.) 13(1), provides that any person may file a complaint with the Commission, and that if the carrier does not "satisfy the complaint" within a reasonable time "it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper." The only significant difference between an investigation opened by the Commission under Section 15(7) or 15(8) and an investigation opened under Section 13(1) lies in the allocation of the burden of persuasion. In a Section 13(1) investigation the protestant bears the burden, while in a Section 15 investigation the carrier bears the burden. Allocation of burdens of persuasion is not so peculiarly a matter for the Commission's exclusive determination that judicial review necessarily is cut off by the structure of the statutory scheme.

Petitioners rely for their contrary argument on *Arrow Transportation Co.*, *supra*, in which this Court held that courts may not enjoin or set aside rate increases when the Commission has decided to allow the rates to become effective. Because the power to investigate is closely related to, and often used in conjunction with, the power to suspend, petitioners argue that both powers are committed to the Commission's complete discretion.

The contention that the power to suspend is committed to the ICC's absolute discretion is incorrect. As the Court held in the *Trans Alaska Pipeline Rates Cases*, No. 77-452 (June 6, 1978), slip op. 6 n.17, *Arrow* stands for only two

propositions: first, that federal courts have no power to enjoin rate changes before the Commission has made a final decision, and second, that the courts may not review the reasonableness of rates as a ground for disagreeing with the Commission's decision to suspend or not to suspend. Courts may, however, examine a suspension decision to determine whether "the Commission has overstepped the bounds of its authority" (*ibid.*) by suspending rates that are not within the suspension power.

Moreover, the *Trans Alaska Pipeline Rates Cases*, like *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289 (1975), and *Arrow* itself, show that the principal reason for denying to courts the power to review the Commission's suspension decisions is that an injunction against the charging of a particular rate—or an order lifting a suspension imposed by the Commission— jeopardizes the statutory goal of ensuring uniform and predictable rates. Congress sought to achieve certain ends, and to strike a compromise between the competing interest of shippers and carriers, by giving the Commission the sole authority to make suspension decisions based on a preliminary assessment of the reasonableness of rates. Allowing judicial review of decisions not to open an investigation, however, does not jeopardize the uniformity or predictability of rates or interfere with the Commission's ability to carry out the statutory compromise. The arguments that support the nonreviewability of suspension decisions therefore simply do not apply to decisions not to investigate new rates.[8]

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[8]The Commission—but not the other petitioners—contends that *City of Chicago* v. *United States*, 396 U.S. 162 (1969), establishes that decisions not to investigate are not judicially reviewable (ICC Pet. 12, 14-15). Petitioner Southern Railway argues that *City of Chicago* is irrelevant here (Southern Pet. 10, 12 & nn.10, 13). We agree with petitioner Southern Railway. In *City of Chicago* the ICC conducted an investigation into the propriety of a discontinuation of service and found, after full proceedings, that the discontinuation was lawful. It memorialized this decision by "terminating" its investigation—that is, by deciding to take no further action. The Court held that this decision is judicially reviewable. It also remarked in passing that "[w]hether the Commission should make an investigation of a §13a(1) discontinuance is of course within its discretion, a matter which is not reviewable." 396 U.S. at 165.

The court of appeals' use of *City of Chicago* for the proposition that decisions not to investigate are reviewable (Pet. App. 9a-10a) is improper because *City of Chicago* involved a decision on the merits. The Commission's use of the case also is improper—not only because the passage quoted above is dicta but also because it involved an investigation under a section of the statute that gives the Commission discretion. With respect to discontinuations of service "the Commission shall have authority * * * to enter upon an investigation" (49 U.S.C. (1976 ed.) 13a(1)). With respect to changes in rates, it ultimately "shall be the duty of the Commission to investigate the matters complained of" (49 U.S.C. (1976 ed.) 13(1)), even though the language of Section 15 is discretionary. The difference in language is telling.



*b.* It does not follow from our argument, however, that the decision of the ICC not to open an investigation is judicially reviewable as soon as the decision has been made. Judicial review is limited, in most instances, to "final" agency orders. 5 U.S.C. 704. The decision not to open an investigation is not necessarily "final."

It should be plain that the decision not to open an investigation under Section 15(7) or 15(8) has no immediate "bite." Whether or not an investigation is commenced, the carriers may continue to charge the new rates unless the rates are suspended. In the present case, for example, the Commission decided not to suspend. The rates went into effect in September 1977 and expired, of their own force, in December 1977. The pendency of an investigation would have had no effect on the rates actually charged. Moreover, as we have discussed above, the decision by the Commission not to open a Section 15 investigation does not even determine whether there will be an investigation. Any person can obtain an investigation by filing a complaint under Section 13(1). The Commission must adjudicate the complaint, and judicial

review then is available. The question whether the rates charged under the seasonal tariff were lawful can be determined by the Commission, and reviewed by a court, whether or not the Commission opens a Section 15 investigation.

In other words, the decision by the Commission not to open an investigation under Section 15 is not the same as a final decision to approve the rates. The ICC doubtless is required by the statute to disapprove unlawful rates, but the decision not to open an investigation under Section 15 is no more than a decision that claims of unlawfulness should be tested in a Section 13(1) proceeding. The Commission's decision does not finally adjudicate any contested issue or foreclose any argument.[9] It decides, at most, who shall bear the burden of proof in any ensuing investigation.

Suppose that the Commission were to indicate, at the outset of a Section 13(1) proceeding, that the pleadings and affidavits convinced it that the rates in question were probably unlawful, and that, as a result, the burden fell on the carriers to rebut the *prima facie* showing. Would this allocation of proof be judicially reviewable at once? Few would make the argument in favor of review. The allocation of burdens, although ultimately subject to judicial review, traditionally is reviewed at the end of the proceedings together with all of the other questions that also are subject to judicial review. Piecemeal judicial

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[9]This case therefore does not present the question, which the Court elected to pretermit in *SCRAP, supra*, 422 U.S. at 316-319 & n.18, whether a decision by the Commission in a general revenue proceeding that the railroads need additional revenue is subject to immediate judicial review. A decision concerning revenue needs finally adjudicates at least one factual issue that is not subject to reexamination in a Section 13 proceeding. Here, by contrast, no question of adjudicative fact has been resolved.



review of administrative decisions may slow the administrative process and may, in addition, require the courts to resolve questions that turn out to be irrelevant to the proper disposition of the case. In the example just given, judicial review of the allocation of the burdens easily could consume six months, while the completion of the administrative proceedings might take only a few days. And if it should turn out that the shippers were able to carry their burden, the question of allocation would be irrelevant; the judicial effort devoted to resolving that question (which would involve essentially an assessment of the pleadings and affidavits filed in the administrative proceedings) might be completely wasted.

There is no more reason for immediate judicial review of the Commission's decision not to open a Section 15 investigation than there is for immediate judicial review of the allocation of burdens discussed above. Every administrative proceeding raises some question about the burden of proof and the burden of persuasion. The allocation of burdens may be one of many (potentially) dispositive issues. And an incorrect decision by the administrative agency on any one of the dispositive issues may require the proceedings to be redone. But that has never been thought to call for immediate judicial review of the agency's intermediate decisions. "[I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages." *McKart* v. *United States*, 395 U.S. 185, 194 (1969). This principle underlies both the doctrine of ripeness and the doctrine of exhaustion of administrative remedies. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158 (1967); *Nader* v. *Volpe*, 466 F. 2d 261, 265-269 (D.C. Cir. 1972) (collecting cases); *Grutka* v. *Barbour*, 549 F. 2d 5 (7th Cir.), cert. denied, 431 U.S. 908 (1977).

The Commission's decision not to open a Section 15 investigation is but a single step—albeit an important one—in the resolution of contentions that a rate increase is unlawful. We believe that the decision can be reviewed, but that review should await an appropriate occasion. The Commission's final decision on a Section 13(1) proceeding is such an occasion. The reviewing court, with the full record before it, could determine whether the Commission's allocation of the burden of persuasion to the shippers rather than to the carriers had an effect on the outcome of the decision.[10] If the court finds that it did, the court then could examine the record to determine whether information in the Commission's possession at the time it decided not to open a Section 15 investigation so convincingly demonstrated the probable unlawfulness of the rate that the Commission's decision was arbitrary and capricious. And if the decision was arbitrary, the court could set aside the Commission's order or remand for further proceedings. This procedure would both ensure judicial review of the Commission's decision under Section 15 and minimize the disruption, delay, and waste of judicial time that might be caused by piecemeal litigation of the Commission's decisions.

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[10]In the present case the inquiry might end at this point. If the surcharge was unlawful under the long-and-short-haul provisions of Section 4, it was unlawful without regard to who bears the burden of persuasion. Long-and-short-haul violations cannot be justified by the reasonableness of the rates charged. See note 5, *supra*.



## CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1978

DOJ-1978-11